

LYNCHBURG CITY COUNCIL

Agenda Item Summary

MEETING DATE: **February 11, 2003**

AGENDA ITEM NO.: 23

CONSENT:

REGULAR: **X**

CLOSED SESSION:

(Confidential)

ACTION: **X**

INFORMATION:

ITEM TITLE: **Lease Agreement for the Holiday Inn Select Parking Deck**

RECOMMENDATION: Receive bids for the lease of the City owned parking deck adjacent to the Holiday Inn Select and award a lease as considered appropriate by the adoption of the attached ordinance.

SUMMARY: Negotiations have been ongoing with Orix Capital Markets, owners of the Holiday Inn Select, regarding the lease of the City owned parking deck located adjacent to the hotel. The availability of adequate parking is considered critical to the success of the hotel. Previously, the lease for the parking deck was only for a five year period. That lease has expired. Orix desires that the lease term be for 30 years so that the parking deck is clearly tied to the hotel property. Accommodating this desire to have a lease term of longer than five years triggered the franchise provisions of the Virginia State Code (copy attached). Orix also asked that the franchise be assignable so that they can sell the property. Orix is, in essence a financial institution, not a hotel business, and they are marketing the property. It is felt that both the 30 year term and the ability to assign the lease are critical to selling the property.

The franchise provisions of the State Code require that Council receive bids in a public meeting. Orix has submitted a bid which is attached. While it is doubtful, other bids could be received during your meeting on Tuesday. It is asked that the Mayor receive any additional bids at 7:30 p.m. and then staff will make its recommendation during General Business.

The lease agreement is complex. Council is encouraged to contact the City Manager prior to the meeting on Tuesday if there are any questions.

PRIOR ACTION(S): None

FISCAL IMPACT: Revenues of \$4200/month (minimum based on occupancy) for the first five years. Subsequently, rents will be tied to the market and to occupancy of the property. The City will continue to have certain responsibilities for the maintenance of the property.

CONTACT(S): Kimball Payne

ATTACHMENT(S): Excerpt from the Code of Virginia regarding the award of franchises; Bid with Proposed Ordinance (Franchise Agreement)

REVIEWED BY: lkp

AN ORDINANCE GRANTING A FRANCHISE TO LYNCHBURG HOTEL, LC, ITS SUCCESSORS AND ASSIGNS TO MANAGE AND OPERATE THE MUNICIPAL PARKING FACILITY LOCATED IN THE 500 BLOCK OF MAIN STREET AND ADJACENT TO THE HOLIDAY INN SELECT HOTEL FOR A PERIOD OF 30 YEARS FROM FEBRUARY 12, 2003 THROUGH FEBRUARY 11, 2033.

WHEREAS, the CITY OF LYNCHBURG, a municipal corporation of the Commonwealth of Virginia, hereinafter referred to as “City” is the owner of a certain off street parking facility known as the Municipal Parking Facility which is located in the 500 block of Main Street and adjacent to the Holiday Inn Select Hotel, and more particularly described on Exhibit A attached hereto and incorporated herein, hereinafter referred to as the “Parking Facility” or the “Premises”;

WHEREAS, LYNCHBURG HOTEL, LC, a Virginia corporation, hereinafter referred to as the “Hotel” is engaged in the business of managing and operating a hotel facility within the City of Lynchburg known as the Holiday Inn Select Hotel located at 601 Main Street, Lynchburg, Virginia, and more particularly described on Exhibit B attached hereto and incorporated herein (the “Hotel”); and

WHEREAS, the Hotel is desirous of managing and operating the Parking Facility and the City is willing to grant a franchise the Parking Facility to the Hotel in accordance with the terms hereinafter set forth in this Agreement of Franchise, hereinafter referred to as the “Franchise.”

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LYNCHBURG AS FOLLOWS:

ARTICLE I - GRANT

Subject to the provisions, conditions, and restrictions hereinafter set forth the Hotel is hereby granted the right, privilege, franchise and authority to manage and operate the off street parking facility known as the Municipal Parking Facility which is located in the 500 block of Main Street and adjacent to the Holiday Inn Select Hotel. Title to the Premises during the term of this Franchise shall remain in the City.

ARTICLE II - TERM

This Franchise will be effective from February 12, 2003 and will remain in effect until February 11, 2033, subject to the City's right to cancel this Franchise as provided under Article XV-Cancellation by City.

ARTICLE III - RENTAL AND FEES

A. During the first five (5) years of the Franchise the Hotel shall to pay the City, at such places as the City may designate in writing, for the use of the Premises, facilities and rights granted hereunder, rent based upon a percent of the fair market rental rate for parking spaces in downtown Lynchburg and based upon hotel occupancy at the Hotel as follows:

(i) If occupancy at the Hotel is 0% to 54.9%, monthly rent shall be \$4,200.00, which is forty percent (40%) of the current fair market rental rate of thirty-five dollars (\$35.00) per month for downtown parking spaces;

(ii) If occupancy at the Hotel is 55% to 59.9%, monthly rent shall be \$4,900.00, which is forty-seven percent (47%) of the current fair market rental rate of thirty-five dollars (\$35.00) per month for downtown parking spaces; and

(iii) If occupancy at the Hotel exceeds 60%, monthly rent shall be \$5,600.00, which is fifty-three percent (53%) of the current fair market rental rate of thirty-five dollars (\$35.00) per month for downtown parking spaces.

B. After the first five (5) years of this Franchise the Hotel shall pay the City, at such places as the City may designate in writing, for the use of the Premises, facilities and rights granted hereunder, a monthly rent based upon a percent of the fair market rental rate for parking spaces in downtown Lynchburg and based upon hotel occupancy at the Hotel as follows:

(i) If occupancy at the Hotel is 0% to 54.9%, the monthly rent shall be fifty percent (50%) per space of the current fair market rental rate for downtown parking spaces;

(ii) If occupancy at the Hotel is 55% to 59.9%, monthly rent shall be sixty percent (60%) per space of the current fair market rental rate for downtown parking spaces; and

(iii) If occupancy at the Hotel exceeds 60%, monthly rent shall be seventy-five percent (75%) per space of the current fair market rental rate for downtown parking spaces.

For purposes of this agreement, the Hotel's occupancy will be based on the current 241 available rooms on an annualized basis.

After the first five (5) years of this Franchise, the fair market rental rate will be adjusted no more than once every two (2) years. To determine the fair market rental rate for downtown parking spaces the City and the Hotel will mutually agree on the selection of a local, independent appraiser who will conduct a market study to determine the fair market rental rate for downtown parking spaces in the City of Lynchburg. The fair market rental rate arrived at by the appraiser will be used along with the hotel occupancy figures set forth above to calculate the monthly rental rate to be paid to the City by the Hotel.

C. All rent payable under this Franchise shall be payable in advance with the first monthly payment of rent due and payable upon execution of the Franchise and each succeeding monthly payment of rent thereafter shall be paid on or before the 1st day of each succeeding month thereafter throughout the term of this Franchise, with such payments being subject to an annualized adjustment as set forth in the next sentence. Within ten (10) days after the expiration of each calendar year, the Hotel shall send written notice to the City, which notice shall set forth the occupancy at the Hotel for the prior calendar year. In the event the Hotel has overpaid monthly rent for the prior year based upon the sliding scale set forth above, the Hotel shall be entitled to a credit in the amount of such overpayment against the next ensuing monthly rental payment. To the extent the Hotel has underpaid annual rent for such prior year based upon the sliding scale set forth above, the Hotel shall send to the City the amount of such underpayment together with the statement of hotel occupancy for such prior year.

D. If any payment of rent shall not be paid within ten (10) days of the due date, the Hotel shall pay a ten percent (10%) late penalty on the amount of such delinquent payment, which penalty shall at once become due and collectable. Also, interest at a rate equal to the prime lending rate as quoted in the Wall Street Journal on the due date for such rent shall be paid and collected upon the delinquent rent and the applicable penalties. Such interest shall begin on the day following the due date for such rent and all interest shall be calculated on a 365 day year. In the event it becomes necessary for the City to initiate legal proceedings to collect any of the rents and fees payable under this Franchise, the Hotel agrees to pay all reasonable and necessary expenses incurred by the City in such legal proceedings, including court costs and reasonable attorneys' fees.

ARTICLE IV - USE OF PREMISES

The Premises shall be used by the Hotel for the sole purpose of supplying off street parking for motor vehicles and the charging of a fee therefor and uses reasonably ancillary thereto.

ARTICLE V - REASONABLE PARKING FEES

The Hotel shall charge reasonable parking fees and rates for the rental of parking spaces in the Parking Facility. The Hotel will give the City thirty (30) days written notice of any increases in the parking fees and rates.

ARTICLE VI - HOURS OF OPERATION

The Hotel shall operate the Parking Facility and keep the Premises open for business a minimum of sixteen (16) hours per day during the week with flexible hours during the weekends. The hours of operation of the Parking Facility may be modified by the Hotel depending upon the need of the public for such Parking Facility.

ARTICLE VII - MAINTENANCE

It shall be the duty of the Hotel, at its sole cost and expense, to keep and maintain the Premises, including the parking ramp, sidewalks and the shrubbery and landscaped areas surrounding the Parking Facility, and all of the air conditioning, heating, plumbing, electrical and other equipment and apparatus therein in substantially the same order and repair as at the inception of this Franchise, reasonable wear and tear excepted, provided, however, that the City shall, as it becomes necessary for the preservation of the Premises, maintain and make all repairs and replacements to the structure and roof of the Parking Facility, excluding door screens and glass. It shall be the Hotel's responsibility to remove all snow and ice from the premises of the Parking Facility and from the public sidewalks adjacent to the Parking Facility. Notwithstanding anything in this Franchise to the contrary, to the extent the City provides free city services such

as police and fire protection, snow removal and area lighting to the general public, public spaces, and/or public roadways in or around the Parking Facility, the Parking Facility shall receive the same city services at no additional charge. Other than as specifically set forth herein, the City shall have no obligation to make repairs to or maintain the Parking Facility.

The City agrees to complete, no later than _____, all three phases of structural repairs to the Premises in a good and workmanlike manner, in compliance with all laws, as described in the Hurt & Proffitt Inc. Holiday Inn Select Parking Garage assessment and revisit of the 1996 structural analysis report dated November 2, 2001 included as Exhibit C hereto.

The City shall have the right to inspect the Premises and prescribe a reasonable program of preventative maintenance in order to keep the Premises in good order and repair; provided, however, the City shall in no event prescribe more than one (1) preventative maintenance program per year. The City also reserves the right to inspect the Premises and to prepare a list of needed repairs above and beyond routine repairs. The Hotel, at its sole cost and expense, shall implement the preventative maintenance program and make the needed repairs identified by the City provided, notwithstanding anything in this Franchise to the contrary, such expenses shall not exceed \$10,000.00 per year in the aggregate. Each year this Franchise remains in effect the \$10,000.00 aggregate will be increased by the amount the Consumer Price Index increased during the preceding year. If the City determines that repairs and maintenance to the Parking Facility are necessary to protect the health and safety of the public and the aggregate amount of such repairs and maintenance exceed \$10,000.00 or the adjusted \$10,000.00 aggregate for any calendar year, the Hotel, at its sole discretion, can (i) terminate this Franchise free of any penalty whereupon the Hotel shall be released from all liability for the performance or observance of the covenants and conditions in the Franchise from and after the date of such termination or

(ii) choose to make and pay for such repairs and maintenance identified by the City. Except as set forth in the immediately preceding sentence, if the Hotel fails to implement the preventative maintenance program or to make the needed repairs required by the City, the City shall have the right to either (a) cancel this Franchise Agreement as provided in Article XV - Cancellation by City or (b) enter on the Premises and perform such preventative maintenance or make such needed repairs, the cost of which shall be the obligation of the Hotel.

The Hotel at its sole cost and expense shall keep the Parking Facility, including the parking ramp, sidewalks and landscaped areas around the Parking Facility, in a clean and sanitary condition, including the removal of snow and ice in the winter, grass mowing, trimming of shrubbery, pruning and mulching, and will remove all garbage, debris and trash from the Premises on a daily basis. The Hotel's maintenance shall include the replacement of all light bulbs and the maintenance and repair of all signs used by the Hotel in the Parking Facility.

For the purpose of performing its responsibilities hereunder, the City shall have the right to enter upon the Premises at such times as the City in its sole discretion deems necessary, including the right to store on the Premises, without unreasonable interference with Hotel's use of Parking Facility, the parts, equipment and materials necessary to perform such responsibilities, at no cost or liability to Hotel.

ARTICLE VIII - ADDITIONS AND ALTERATIONS

The Hotel shall have the right, during the term of this Franchise, to make alterations, attach fixtures and erect additions on the Premises upon the prior written approval of the City, such approval not to be unreasonably withheld or delayed. At the end of the Franchise Term (initial or extended), such alterations, fixtures and additions shall become the property of the City and may not be removed from the Premises without the prior written approval of the City.

ARTICLE IX - UTILITIES

The Hotel shall pay for all heating, sewer, gas, water, electricity, telephone and other utility services which may arise from the Hotel's use of the Premises, and if required by the utility service as a condition for said services, the Hotel, at its sole cost and expense, will install, maintain, relocate and pay for standard metering devices for the measuring of such services.

ARTICLE X - SECURITY

The Hotel will be responsible for providing whatever security it deems necessary, at its sole discretion, for the operation of the Parking Facility.

ARTICLE XI - RULES, REGULATIONS AND LAWS

The Hotel covenants and agrees to observe all reasonable rules and regulations promulgated from time to time by the City concerning the conduct of and operation of the Parking Facility. Any rule and regulations promulgated by the City under this Article shall not be in conflict with the terms of this Franchise. The City agrees that, except in cases of emergency, it will give notice to the Hotel of all such rules and regulations adopted by it at least thirty (30) days before the Hotel shall be required to comply therewith.

The Hotel shall comply with all federal, state, and local laws and ordinances, governmental rules, regulations and orders applicable to the operation of the Parking Facility. The Hotel shall, for the City's information, deliver to the City promptly, a true copy of any notice, warning, summons, or other legal process for the enforcement of any such laws, ordinances, rules, regulations or orders as they pertain to the operations of the Parking Facility. The Hotel shall indemnify, hold the City harmless and defend the City from and against any and all claims, actions, damages, liabilities, fines, penalties, costs and expenses suffered or incurred by the City as a result of Hotel's noncompliance with applicable laws, ordinances, resolution or

regulations. The Hotel shall have such time within which to comply with the aforementioned laws, ordinances, rules and regulations as the authorities enforcing the same shall allow.

ARTICLE XII - INSPECTION

The City, its agents and employees, shall have the right to enter onto the Premises at all reasonable times in order to determine that the Hotel has complied with and is complying with the terms and conditions of this Franchise and in order to perform maintenance and make repairs and replacements to the Premises in accordance with the terms of this Franchise.

ARTICLE XIII - RECORDS

The Hotel shall keep true and complete records and accounts of all gross receipts and business transacted in the operation of the Parking Facility. Upon request from the City, such request not to occur more than twice in any year, the Hotel will furnish to the City copies of such records and accounts and a statement of the annual gross receipts of the Parking Facility. Also, upon request of the City, and to the extent the Hotel possesses such information, the Hotel will furnish to the City information concerning the use of the Parking Facility by the general public in order that the City can adequately plan for the future parking needs of the City and its citizens.

ARTICLE XIV - DAMAGE OR DESTRUCTION OF FRANCHISED PREMISES

If the Premises shall be partially damaged by fire, the elements, public enemy or other casualty so as to affect the Hotel's use of the space therein, but not render it untenable, the same shall be repaired with due diligence by the City at its own cost and expense, unless such damage was caused by the negligent or willful acts or omissions of the Hotel, its employees, or agents that it allows to be on the Premises. If the damage shall be so extensive as to render untenable the Hotel's use of the Premises, but is capable of being repaired with thirty (30) days, the same shall be repaired with due diligence by the City at its own cost and expense, whereupon the rent shall be abated until such time as the Premises have been restored to a

tenantable condition. If the Premises are completely destroyed by fire, the elements, the public enemy, or other casualty or are so damaged that the Premises are untenable for more than thirty (30) days, then, at the option of the City, either (1) the City shall repair and reconstruct the Premises with due diligence at its own cost and expense and the rent payable hereunder with respect to the Hotel's use of the Premises shall be abated until such time as the Premises shall be restored to a tenantable condition, or (2) the City shall notify the Hotel within thirty (30) days after such damage or destruction that the City does not intend to restore the Premises, in which case, this Franchise shall automatically terminate, and the Hotel's obligation to pay rent shall terminate.

The Hotel shall be responsible for any damage that it, or its employees, or agents may cause to the Premises or any equipment or property the City has on the Premises.

The City shall not be liable for any damage to or loss of any of the Hotel's property or the property of its agents, employees or customers, unless such damage or loss occurs as a result of the City's gross negligence or willful misconduct. It is expressly agreed and understood that the Hotel, its agents, employees and customers in placing property in and on the Premises, do so at their own risk.

ARTICLE XV - CANCELLATION BY CITY

Subject to Article XIX, the City may cancel this Franchise, without forfeiture, waiver, or release of the City's right to any sum of money due or to become due under the provisions of this Franchise, upon or after the happening of any one of the following events:

- (A) The failure to pay rent or any other sums due under this Franchise within thirty (30) days after written notice from the City.
- (B) The filing by the Hotel of a voluntary petition in bankruptcy.

(C) The institution of bankruptcy proceedings against the Hotel and the adjudication of the Hotel as a bankrupt pursuant to such proceedings, to the extent such proceedings are not dismissed within ninety (90) days after the filing of such proceedings.

(D) The taking by a court of competent jurisdiction of the Hotel's assets pursuant to proceedings brought under the provisions of any federal reorganization act.

(E) The appointment of a receiver of the Hotel's assets.

(F) Voluntary abandonment of the Premises by the Hotel for a period of more than sixty (60) consecutive days. If the Hotel ceases to operate the Parking Facility and keep it open to the public for a period of more than sixty (60) consecutive days the City shall have the right to step in and take over the day-to-day operations of the Parking Facility in order to ensure that it remains open to the public and during the period of time the City is managing the day-to-day operations of the Parking Facility the City shall have the right to collect all revenues from the Parking Facility.

(G) Except with respect to those defaults set forth in Paragraph A of this Article XV, the default by the Hotel in the performance or non performance of any covenant or agreement herein required to be performed by, or required not to be performed by, the Hotel and the failure of the Hotel to remedy such defaults within a period of fifteen (15) days after receipt from the City of written notice to remedy the same.

(H) Any assignment made by the Hotel for the benefit of its creditors.

No waiver of default by the City of the terms, covenants or conditions hereof to be performed, kept or observed by the Hotel shall be construed to be or act as a waiver of any subsequent default of any terms, conditions or covenants herein contained to be performed, kept or observed by the Hotel. The acceptance of rent or the performance of all or any part of this

Franchise by the City for or during any period or periods after default of any terms, covenants or conditions herein contained to be performed, kept or observed by the Hotel, shall not be deemed a waiver of any rights on the part of the City to cancel this Franchise for failure to so perform, keep or observe any of the terms, covenants or conditions hereof to be performed, kept or observed by the Hotel.

ARTICLE XVI - SURRENDER OF POSSESSION

Upon the expiration and termination of this Franchise, the Hotel's authority to use the Premises, rights and facilities herein granted shall cease, and the Hotel shall, upon such expiration or termination, promptly and in good condition, surrender the same to the City, ordinary wear and tear excepted.

ARTICLE XVII - INDEMNITY AND INSURANCE

The Hotel shall indemnify and hold harmless and assume the defense of the City, its employees, officers and agents, from and against any and all claims, liabilities, judgments, costs, causes of action, damages and expenses of any nature whatsoever, and shall pay all reasonable attorneys' fees, court costs and other costs incurred in defending such claims, which may accrue against, be charged to, be recovered from or sought to be recovered from the City, its employees, officers or agents by reason of or on account of damage to property or injury to or death of any person or any other claim of any nature whatsoever arising from the Hotel's use of the Premises as an off street parking facility, regardless of whether or not such property damage, personal injury or death or other claim results from the actions of the Hotel's employees and agents or results from the acts of any other person whatsoever, whether or not such persons are subject to the Hotel's control. Notwithstanding the foregoing, in no event shall Hotel be required to indemnify and hold harmless and assume the defense of the City to the extent such damages, injuries or deaths result from the negligence or willful misconduct of the City, and/or its officers,

agents and employees. In order to effect the same, during the term, the Hotel agrees to maintain and pay for a public liability insurance policy on the Premises in at least the amount of \$1,000,000 against general public liability for injuries to or death of persons or damages to property in or about the Premises. Every two (2) years the City will review the amount of the general liability insurance policy and if the City reasonably determines that the amount of such insurance coverage is not sufficient to protect the City, its officers, employees and agents from claims and lawsuits arising out of the Hotel's management and operation of the Parking Facility, the City shall have the right to require the Hotel to increase the amount of the insurance coverage required by this Franchise up to but not exceeding \$5,000,000. Such insurance policy shall name the City, its officers, employees and agents as insured parties and shall include or be endorsed to include the contractual liability assumed by the Hotel under the indemnity agreement contained in this paragraph. The Hotel shall deliver to the City a copy of said insurance policy or certificate showing the same to be in full force and effect before occupying the Premises. The insurance policy or certificate shall contain provisions providing that the City shall be given thirty (30) days written notice prior to any cancellation or reduction in the required coverage. The insurance required hereunder shall be primary, and any insurance or self insurance maintained by the City shall be in excess of and shall not contribute with any insurance provided under this Agreement.

Any deductibles of self insured retentions applicable to required insurance coverage shall be paid by the Hotel and the City shall not be required to participate therewith. All rights of subrogation against the City shall be waived.

The failure of the Hotel to pay all insurance premiums when due and payable shall be grounds for the immediate termination of this Agreement by the City, any contrary provisions

contained in Article XV CANCELLATION BY CITY notwithstanding. The Hotel's obligation to the City hereunder shall not be limited to the amount of such insurance coverage and shall survive the termination or expiration of this Franchise.

The City shall obtain property insurance on the Premises by adding it to the insurance policy the City has in force to cover damages to other City buildings and the City shall be the sole beneficiary of such insurance.

ARTICLE XVIII - NOTICES

Notice to the Hotel, provided for herein, shall be sufficient if sent by registered mail, postage prepaid, addressed to Lynchburg Hotel, LC, c/o ORIX Capital Markets, 1717 Main Street, Suite 1400, Dallas, Texas 75201. Notice to the City, provided for herein, shall be sufficient if sent by registered mail, postage prepaid, addressed to the City Manager, City Hall, P.O. Box 60, Lynchburg, Virginia 24505.

ARTICLE XIX - FRANCHISE MORTGAGEE PROVISIONS

Hotel shall have the right to mortgage this Franchise, and the estate created hereby, without the consent of the City. The execution and delivery of any such mortgage shall not be deemed to constitute an assignment or transfer of this Franchise or of any interest herein nor shall any Franchise Mortgagee (as hereinafter defined), as such, be deemed to be an assignee or a transferee of this Franchise or of any interest herein so as to require such Franchise Mortgagee to assume the performance or observance of any of the terms, covenants or conditions on the part of the Hotel to be performed or observed hereunder. Each such mortgage shall be subject and subordinate to all of the terms, covenants, conditions and restrictions set forth in this Franchise, but shall have the benefits granted to Franchise Mortgagee's hereunder. A Franchise Mortgagee is defined as any holder of a mortgage constituting a lien upon the Hotel's interest in this Franchise and the estate created hereby. A Franchise Mortgagee may enforce its rights under its

mortgage and acquire title to the Hotel's interest in the Premises in any lawful way, and pending foreclosure of such leasehold mortgage, take possession of the Premises. If the Franchise Mortgagee shall acquire title to the Hotel's interest in this Franchise by any lawful means whatsoever (including, without limitation, by foreclosure, by assignment in lieu of foreclosure or by assignment from a designee or wholly owned subsidiary of the Franchise Mortgagee), then the Franchise Mortgagee shall have the right to freely assign this Franchise, without the consent of the City, and shall thereupon be released from all liability for performance or observance of the covenants and conditions in this Franchise from and after the date of such assignment. The Hotel may sublet or assign its interest in this Franchise to any Franchise Mortgagee (or its designee), without the City's consent, and such Franchise Mortgagee (and its, or its designee's, successors and assigns) shall have the right subsequently to sublet or assign such interest in this Franchise without the City's consent. Upon any such assignment, the Franchise Mortgagee (and its, or its designee's, successors and assigns) shall have no further obligations or liability under this Franchise. Any and all notices and other communications provided by the City under this Franchise shall additionally be delivered to any Franchise Mortgagee that sends written notice to the City of the existence of such leasehold mortgage with such Franchise Mortgagee's address for purpose of notices. Should the Hotel be in default under this Franchise, beyond applicable notice and cure periods, prior to terminating this Franchise, the City shall provide to the Franchise Mortgagee a period of thirty (30) days after written notice thereof from the City to remedy such default if such Franchise Mortgagee desires, but such Franchise Mortgagee shall have no obligation to remedy same. If Franchise Mortgagee remedies the default, the City shall accept the cure from Franchise Mortgagee as the cure of the Hotel and the City shall have no right to terminate this Franchise as a result of such default.

The purpose of this Franchise is to help ensure the successful operation of the Hotel by allowing the Hotel to operate and manage the Parking Facility to make sure adequate parking is available for the Hotel's guests. Therefore, a Franchise Mortgagee may only assign this Franchise to the person, firm, corporation or other entity that owns and operates the Hotel. Further, the terms of this Franchise only allow the Parking Facility to be operated in conjunction with the operation of the Hotel. In the event the Hotel ceases to operate, the Parking Facility may not be operated as a separate entity. If the Hotel ceases to operate and fails to offer lodging to the general public for a period of more than ninety (90) days this Franchise Agreement shall automatically terminate.

ARTICLE XX - GENERAL PROVISIONS

A. Major repairs, rebuilding or expansion may take place during the term of this Franchise and the Hotel accepts this Franchise subject to any inconvenience or loss of use of said Premises or any part thereof which may become necessary because of said repairs, construction or expansion. However, should such repairs, rebuilding or expansion render a portion of the Premises untenable, the rental rate shall be proportionately abated according to the ratio of the untenable property to the Premises.

B. Marginal headings contained in this Franchise are for convenience only and shall not be considered to amplify, relate, modify or otherwise affect any of the terms, provisions or conditions of this Franchise.

C. In the event that any provision of this Franchise shall be construed to be invalid or unenforceable, then the remaining portions shall remain in full force and effect.

D. This Franchise shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

E. It is expressly understood that there shall not be any duty upon the City under this Franchise to remove ice or snow from the Premises and that it is the sole responsibility of the Hotel to remove ice and snow from the Premises and to the adjoining sidewalks. To the extent the City provides snow and ice removal to the general public as a free service, the City shall provide snow removal on the public streets adjacent to the Parking Facility free of charge.

F. The City shall not be liable for any loss of revenue to the Hotel resulting from the City's acts or omissions in the maintenance and operation of the Parking Facility.

G. The Hotel may not make any assignment of all or a portion of with the Parking Facility without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. In the event the Hotel sells or conveys the hotel property to a third party this Franchise may not be assigned to the new owner without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. If the City consents to the assignment, the new owner of the Hotel shall notify the City in writing promptly following such transfer and assignment and provide the City with a contact person and address of such assignee for purposes of notice. Moreover, provided such assignee assumes the Hotel's obligations under this Franchise in writing, the Hotel shall be released from all liability and obligations arising under this Franchise from and after the date of such assignment.

H. The Hotel does hereby covenant and agree that no person on the grounds of race, sex, color or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said Parking Facility. Further, the Hotel agrees that it will not discriminate against and will make all reasonable efforts to accommodate persons with disabilities as required by the Americans with Disabilities Act.

I. Each month throughout the term of this Franchise the Hotel agrees to provide the City with five free room nights at the Hotel, subject to availability, for the sole purpose of providing lodging to visitors from out of town. The free room nights shall not include meals, beverages, taxes, or any other amenities at the Hotel, which are not generally free to Hotel guests. In order for the City to take advantage of the free room nights a representative from the City's Communications & Marketing Department shall contact the Hotel's Manager on at least five (5) days' prior notice, and the Manager will make the necessary arrangements for the free room nights.

J. The City shall be responsible for all real estate taxes with respect to the Premises.

K. The Hotel, upon performing and observing the covenants, agreements and conditions of this Franchise on its part to be performed and observed shall and may peaceably and quietly occupy and enjoy the Premises during the Term of this Franchise without hindrance of molestation by or from anyone claiming by, through or under the City.

L. Each party shall, upon request of the other party, deliver to such other party upon not less than fifteen (15) days' prior notice, an estoppel certificate executed and acknowledged by such party stating (a) that such party knows of no condition or event which constitutes a default beyond applicable notice and cure periods or which, with notice or lapse of time or both, constitute a default beyond applicable notice and cure periods, or, if any such condition or event exists, specifying the nature and period of existence thereof and what action such party is taking or proposes to take with respect thereto, and (b) that this Franchise is unmodified and in full force and effect (or, if modified, stating the modifications and certifying that as so modified, this Franchise is in full force and effect).

M. Notwithstanding anything in this Lease to the contrary, upon the occurrence of a default beyond applicable notice and cure periods, the City may proceed against the Lessee's assets only to the extent of the Lessee's obligations to the City under this Lease

N. Notwithstanding anything to the contrary contained herein, the Hotel agrees that the City shall have no personal liability with respect to any of the provisions of this Franchise and the Hotel shall look solely to the estate and property of the City and the land and buildings comprising the Premises for the satisfaction of the Hotel's remedies, including, without limitation, the collection of any judgment or any event of any default or breach by the City with respect to any of the terms and provisions of this Franchise to be observed and/or performed by the City and no other assets of the City shall be subject to levy, execution or other judicial process for the satisfaction of the Hotel's claim and, in the event the Hotel obtains a judgment against the City, the judgment docket shall be so noted.

O. The Hotel shall have the right to record a memorandum of this Franchise and the City shall execute and deliver such memorandum upon the Hotel's request. The cost of preparing and recording such memorandum shall be paid by the Hotel.

ARTICLE XXI - METHOD OF ACCEPTANCE

Any person, firm or corporation, or other entity bidding for this Franchise shall deposit with the bid its check in the sum of \$1,000. Payable to the City as the security to the City that the Grantee shall accept the Franchise within thirty (30) days after the adoption of the ordinance granting the same. Upon the failure of the Grantee to accept this Franchise pursuant to the provisions of this article, the Grantee shall forfeit the deposit to the City. The checks of all other bidders shall be returned upon the acceptance of the successful bid. The check will be returned to the successful bidder upon the execution of the Franchise.

This Franchise shall be and become effective and shall constitute a contract of Franchise between the City and the Grantee when the Grantee shall cause a copy thereof to be signed by a proper official of the Grantee duly authorized thereto and under its corporate seal, duly attested to by an authorized official of the Grantee accepting the terms and provisions of the Franchise on behalf of said Grantee.

Adopted:_____

Certified:_____

Clerk of Council

042L

FORM OF ACCEPTANCE

The foregoing Franchise, as set forth in the ordinance adopted by the Council of the City of Lynchburg, Virginia on _____, 2003 , is hereby accepted by Lynchburg Hotel, LC, Grantee, according to the terms thereof for a period beginning February 12, 2003 and continuing through February 11, 2033.

This acceptance is executed on behalf of Lynchburg Hotel, LC by _____ and _____, its President and Secretary, respectively, this _____ day of _____, 2003, by virtue of authority duly and properly vested in them as officers of said corporation.

LYNCHBURG HOTEL, LC

By: _____
President

Attest:

Secretary

Excerpt from the Code of Virginia regarding the award of franchises

§ 15.2-2100. Restrictions on selling certain municipal public property and granting franchises.

A. No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance passed by a recorded affirmative vote of three-fourths of all the members elected to the council, notwithstanding any contrary provision of law, general or special, and under such other restrictions as may be imposed by law. Notwithstanding any contrary provision of law, general or special, in case of a veto by the mayor of such an ordinance, it shall require a recorded affirmative vote of three-fourths of all the members elected to the council to override the veto.

B. No franchise, lease or right of any kind to use any such public property or any other public property or easement of any description, in a manner not permitted to the general public, shall be granted for a period longer than forty years, except for air rights together with easements for columns for support, which may be granted for a period not exceeding sixty years.

Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor, in such manner as is provided by § [15.2-2102](#), and shall then act as may be required by law.

Such grant, and any contract in pursuance thereof, may provide that, upon the termination of the grant, the plant as well as the property, if any, of the grantee in the streets, avenues and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation become the property of the city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise.

Any such plant or property acquired by a city or town may be sold or leased or, if authorized by general law, maintained, controlled, and operated by such city or town. Every such grant shall specify the mode of determining any valuation therein provided for and shall make adequate provisions by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant.

C. Any additional restriction now required in any existing municipal charter relating to the powers of cities and towns in selling or granting franchises or leasing any of their property is hereby superseded; however, nothing herein contained shall be construed as affecting the term of any existing franchise, lease or right. The requirement of an affirmative three-fourths vote of council shall apply only to the sale of the listed properties and not to their franchise, lease or use.

D. The provisions of this section shall only apply to cities or towns and shall not apply to counties or other political subdivisions.

(Code 1950, § 15-727; 1962, c. 623, § 15.1-307; 1971, Ex. Sess., c. 64; 1997, c. 587; 2001, c. 498.)

§ 15.2-2101. Ordinance proposing grant of franchise, etc., to be advertised.

A. Before granting any franchise, privilege, lease or right of any kind to use any public property described in § [15.2-2100](#) or easement of any description, for a term in excess of five years, except in the case of and for a trunk railway, the city or town proposing to make the grant shall advertise a descriptive notice of the ordinance proposing to make the grant once a week for two successive weeks in a newspaper having general circulation in the city or town. The descriptive notice of the ordinance may also be advertised as many times in such other newspaper or newspapers, published outside the city, town or Commonwealth, as the council may determine. The advertisement shall include a statement that a copy of the full text of the ordinance is on file in the office of the clerk of the city or town council.

B. The advertisement shall invite bids for the franchise, privilege, lease or right proposed to be granted in the ordinance. The bids shall be in writing and delivered upon the day and hour named in the advertisement and shall be opened in public session and marked for identification by the person designated in the advertisement to receive such bids. The cost of the required advertisement shall be paid by the city or town which shall be reimbursed by the person to whom the grant is made. The city or town shall have the right to reject any and all bids and shall reserve this right in the advertisement.

(Code 1950, §§ 15-728, 15-729; 1962, c. 623, §§ 15.1-308, 15.1-309; 1971, Ex. Sess., c. 64; 1983, c. 138; 1997, c. 587; 2001, c. 498.)

§ 15.2-2102. How bids received and to whom franchise awarded.

The presiding officer shall read aloud, or cause to be read aloud, a brief summary of each of the bids that have been received, for public information, and shall then inquire if any further bids are offered. If further bids are offered, they shall be received. The presiding officer shall thereafter declare the bidding closed. The presiding officer shall receive recommendations from the staff relative to any bids received in advance and staff's recommendations, if any, on any bids received at the advertised council meeting. After such other investigation as the council sees fit to make, the council shall accept the highest bid from a responsible bidder and shall adopt the ordinance as advertised, without substantial variation, except to insert the name of the accepted bidder.

However, the council, by a recorded vote of a majority of the members elected to the council, may reject a higher bid and accept a lower bid from a responsible bidder and award the franchise, right, lease or privilege to the lower bidder, if, in its opinion, some reason affecting the interest of the city or town makes it advisable to do so, which reason shall be expressed in the body of the subsequent ordinance granting the franchise, right, lease or privilege. The process described in this section may run concurrently with any other advertisement or public ordinance requirements of this title, or such requirements as may be contained in charters of such cities or towns.

(Code 1950, § 15-730; 1962, c. 623, § 15.1-310; 1997, c. 587; 2001, c. 498.)

§ 15.2-2103. Award when no satisfactory bid received.

If, after such advertisements, no bid, or no satisfactory bid, is made, the council may advertise for further bids, and in case no bid at all is made, the council, if it sees fit to do so, may adopt an ordinance in the manner required by law granting such franchises, rights, leases or privileges to any person making application therefor.
(Code 1950, § 15-731; 1962, c. 623, § 15.1-311; 1997, c. 587.)

§ 15.2-2104. Bond of person awarded franchise, etc.

The person to whom a franchise, right, lease or privilege is awarded, whether by competing bids or otherwise, shall first execute a bond, with good and sufficient security, in favor of the city or town. The bond shall be in such sum as the city or town shall determine, conditioned upon the construction, operation and maintenance of the plant or plants provided for in the granted franchise, right, lease or privilege.
(Code 1950, §§ 15-732, 15-733; 1962, c. 623, § 15.1-312; 1997, c. 587.)

§ 15.2-2105. How amendments made to franchise, etc.; notice required.

No amendment or extension of any franchise, right, lease or privilege that now exists, or that may hereafter be authorized, which extends or enlarges the time or territory of such franchise, right, lease or privilege, shall be granted by any city or town until the provisions of §§ [15.2-2101](#) through [15.2-2104](#) have been complied with. No amendment that releases the grantee, or his assignee, from the performance of any duty required by the ordinance or that authorizes an increase in the user charges to be made by such grantee or assignee shall be granted until notice of such proposed amendment has given to the public by advertising the proposed amendment for ten days in some newspaper having general circulation in the city or town. The cost of such advertising shall be paid by the city or town, which shall be reimbursed by the person to whom the amendment is granted. No such amendment shall be adopted except by ordinance.
(Code 1950, § 15-734; 1962, c. 623, § 15.1-314; 1997, c. 587.)